

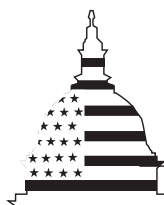
GAO

Report to the Chairman, Committee on
Foreign Affairs, House of
Representatives

September 2007

DEFENSE TRADE

Clarification and More Comprehensive Oversight of Export Exemptions Certified by DOD Are Needed



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Highlights of [GAO-07-1103](#), a report to the Chairman, Committee on Foreign Affairs, House of Representatives

Why GAO Did This Study

In support of Department of Defense (DOD) activities, U.S. defense companies may export defense items. The Department of State (State) controls such exports through its International Traffic in Arms Regulations (ITAR), which provides for some exemptions from export licensing requirements. For a limited number of these exemptions, DOD may confirm—or certify—that the export activity qualifies for the use of an ITAR exemption. As part of an initiative, DOD is to make more effective use of ITAR exemptions, but little is known about the extent to which this is done.

This report (1) describes DOD's approach for certifying exporters' exemption use in support of defense activities, (2) summarizes the use of selected DOD-certified exemptions, and (3) examines State and DOD's oversight of exemption use. GAO's findings are based on its review of export control law, regulation, and DOD guidelines; interviews with State, DOD, and defense industry officials; and a GAO-developed database of DOD certification letters.

What GAO Recommends

GAO is recommending that State and DOD resolve disagreements on exemption use and guidelines, and strengthen oversight through data collection. State and DOD agreed to resolve disagreements, but DOD misunderstood the intent of the recommendation on oversight. In response, GAO clarified the language in this recommendation.

To view the full product, including the scope and methodology, click on [GAO-07-1103](#). For more information, contact Ann Calvaresi-Barr at (202) 512-4841 or calvaresibarra@gao.gov.

DEFENSE TRADE

Clarification and More Comprehensive Oversight of Export Exemptions Certified by DOD Are Needed

What GAO Found

In support of defense activities, DOD prepares letters certifying that a proposed export qualifies for the use of certain ITAR exemptions by exporters. To guide this approach, DOD issued exemption certification guidelines in March 2004 to the military services because they are the DOD components primarily responsible for managing and implementing defense international cooperative programs. However, GAO found other DOD components that also certify the use of exemptions in support of international activities but are not subject to the DOD guidelines. Officials from State, which regulates and controls defense exports, have raised several concerns to DOD about its guidelines, including the use of one ITAR exemption by contractors and the comprehensiveness of the guidelines. While State and DOD officials have met and exchanged correspondence on these issues, to date, they have not resolved fundamental disagreements. A lack of common understanding of regulatory exemption use could result in inconsistent application of the regulations.

The exemption certification letters from DOD components that we reviewed showed that over 1,900 exemptions were certified for about 270 exporters in calendar years 2004 through 2006. The majority of the certifications related to missile defense and Air Force programs and included the export of technical data. While most of the exporters identified in the DOD-certified exemption letters were defense contractors, other exporters included university laboratories and federally funded research and development centers. The United Kingdom, Australia, Canada, and the North Atlantic Treaty Organization were the most frequently cited recipients for exports under exemptions certified by DOD components.

State and DOD lack comprehensive data to oversee the use of DOD-certified exemptions, limiting their knowledge of defense activities under this process. While DOD's guidelines provide for annual reporting to State on certified exemptions, this report captures data from the military services, but not from other DOD components. GAO identified 271 letters from nonservice components that were not included in DOD's 2006 report to State. In addition, DOD's report to State may not capture the magnitude of transfers certified for exemption use. For example, one letter that GAO reviewed certified the use of an exemption for more than 50 companies, but only the certification letter—not the actual transfers, which totaled 600 over a 3-year period—was captured in the cognizant military service's record keeping on exemption certifications. Furthermore, the details on these transfers were not included in DOD's report to State, limiting insight into the number of transfers under this certification.

Contents

Letter		1
	Results in Brief	2
	Background	4
	Guidelines for DOD’s Certification of Exemption Use Have Raised Some Concerns by State	5
	DOD Components Certified the Use of Exemptions for a Variety of Programs and Foreign Recipients	10
	State and DOD Lack Complete Data to Oversee Exemptions Certified by DOD	13
	Conclusions	15
	Recommendations for Executive Action	15
	Agency Comments	16
Appendix I	Scope and Methodology	18
Appendix II	ITAR Sections Discussed in This Report	20
Appendix III	Comments from the Department of Defense	24
Appendix IV	Comments from the Department of State	27
Appendix V	GAO Contact and Staff Acknowledgments	29
Related GAO Products		30
Tables		
	Table 1: ITAR Exemptions Identified in DTSA Guidelines for Military Service Certification and ITAR Exemption Description	8
	Table 2: GAO Analysis of DOD Exemption Certifications (2004 through 2006)	11

Table 3: ITAR Sections Cited in This Report	20
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Figure	
Figure 1: Sample Letter	6

Abbreviations	
DDTC	Directorate of Defense Trade Controls
DOD	Department of Defense
DTSA	Defense Technology Security Administration
ITAR	International Traffic in Arms Regulations
NATO	North Atlantic Treaty Organization

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United States Government Accountability Office
Washington, DC 20548

September 19, 2007

The Honorable Tom Lantos
Chairman
Committee on Foreign Affairs
House of Representatives

Dear Mr. Chairman:

As part of its efforts to promote cost sharing and increase interoperability of defense assets, the Department of Defense (DOD) enters into defense cooperative agreements with allies and friendly nations. In support of these agreements and associated DOD activities, U.S. defense companies may export defense items¹ to foreign governments and defense companies. The Department of State (State) controls the export of defense items, requiring most to be licensed for export through its International Traffic in Arms Regulations (ITAR).² Under certain conditions, however, the ITAR provides for exports to be exempt from license requirements and establishes the criteria for such exemptions. For a limited number of exemptions, DOD may confirm—or certify³—in writing that the export activity qualifies for the use of an ITAR exemption in support of DOD activities, such as sharing of technical data related to DOD acquisition programs. The use of exemptions, including those certified by DOD, and compliance with the ITAR are ultimately the responsibility of the exporter.

Over the past decade, Congress has requested that we examine the U.S. export control system, and we have reported on various problems in the processes for this system.⁴ This report looks at how unlicensed exports in support of DOD activities, such as defense cooperative programs, are overseen. Specifically, in response to your request, this report (1) describes DOD’s approach for certifying the use of export exemptions by

¹ For purposes of this report, “defense items” includes defense articles, technical data, and services.

² International Traffic in Arms Regulations, 22 C.F.R. §§ 120.1–130.17 (2006).

³ DOD uses the term “certify” to confirm that an exemption is being used pursuant to an official written request, directive, or approval from DOD.

⁴ A list of related GAO products is provided at the end of this report.

exporters in support of defense activities, (2) summarizes the use of DOD-certified exemptions that we identified and reviewed, and (3) examines the extent to which State and DOD oversee the use of these exemptions.

To conduct our work, we identified DOD's approach for certifying the use of export exemptions by exporters in support of defense activities through an examination of export control laws, regulations, DOD guidelines, and practices. We also interviewed officials responsible for export controls from State, DOD, and defense companies. To summarize the use of DOD-certified exemptions, we created a database of DOD certification letters issued between 2004 and 2006 that we were able to identify and collect from DOD components. From these data, we extracted information such as the most frequent type of export and top foreign recipients and summarized the results. We coordinated with State and DOD officials to identify a list of DOD components certifying the use of exemptions. However, the universe of all DOD-certified exemptions is unknown, and additional exemption letters might exist. To examine the extent to which State and DOD oversee the use of DOD-certified exemptions, we reviewed DOD's 2006 report to State on exemption certifications and discussed how data were collected with cognizant officials. For more on our scope and methodology, see appendix I. We performed our review from January through July 2007 in accordance with generally accepted government auditing standards.

Results in Brief

DOD components, including the military services, prepare letters certifying the use of certain ITAR exemptions by exporters in support of DOD activities. The letters typically state the exporter's name, the item to be exported, and the applicable ITAR exemption. The military services' approach for certifying the use of ITAR exemptions is set forth in guidelines DOD issued in March 2004, which cover five specific exemptions. These guidelines were issued to the military services because they are the DOD components primarily responsible for managing and implementing international defense cooperative programs. However, we found other nonservice DOD components that are certifying the use of exemptions in support of international activities but that are not subject to the DOD guidelines. Some of these nonservice components had created or were creating their own guidelines, which could lead to inconsistent certification practices. Officials from State, which regulates and controls defense exports, have raised several concerns to DOD about its guidelines, including the use of one ITAR exemption by contractors. According to DOD officials, this exemption is available to contractors when they work in direct support of DOD activities. However, State officials stated that the

exemption is limited to use by U.S. government personnel. State officials also have raised concerns to DOD about the comprehensiveness of DOD's exemption certification guidelines, including the scope and purpose. DOD is in process of revising its guidelines, partially in response to State's concerns. Although senior-level export control officials at both State and DOD have met and exchanged correspondence, to date, State and DOD have not reached agreement on fundamental issues.

The letters provided to us by DOD components showed that over 1,900 exemptions were certified for use by more than 270 exporters in calendar years 2004 through 2006. Two ITAR sections were most commonly cited, covering (1) the export of technical data, including classified information, and (2) the temporary export of technical data or defense services for official use by the U.S. government. The majority of the certified exemptions related to missile defense and Air Force programs. Exporters who were identified in DOD-certified exemption letters included defense contractors, university laboratories, and federally funded research and development centers. Four defense contractors represented more than one-fourth of the exemption certifications during this 3-year period. The United Kingdom, Australia, Canada, and the North Atlantic Treaty Organization (NATO)⁵ were the most frequently cited recipients for exports under exemptions certified by DOD components.

State and DOD lack comprehensive data to oversee the use of DOD-certified exemptions. While DOD's exemption guidelines provide for annual reporting to State on certified exemptions, this report captures data from the military services but not from other DOD components, such as the Missile Defense Agency. For example, in July 2007, DOD's report to State indicated that 161 certification letters were issued by the military services in 2006; for the same year, we collected 271 letters from nonservice components. In addition, the data may not capture the magnitude of transfers certified for exemption use. For example, one letter that we reviewed certified the use of an exemption by more than 50 companies for the purposes of sharing, with allied partners, technical data relating to a quote or bid proposal. Only the certification letter—not the actual transfers, which totaled 600 over a 3-year period—was captured in the cognizant military service's record keeping on exemptions. However, the details on these transfers were not included in DOD's 2006 report to

⁵ NATO is an alliance of 26 countries from North America and Europe committed to fulfilling the goals of the North Atlantic Treaty.

State on exemptions certified by DOD, limiting insight into the number of transfers that occurred.

We are recommending that State and DOD resolve disagreements on exemption use and guidelines and increase insight and oversight of certified exemptions. Specifically, we are recommending that State and DOD establish a work group to resolve disagreements. If needed, State should revise the ITAR to incorporate any necessary changes. Once agreement is reached, DOD should revise its guidelines and make them applicable to all DOD components. We are also recommending that DOD ensure that its report to State is more complete by collecting data, analyzing trends and usage, and reporting on certifications from all DOD components. In commenting on a draft of this report, DOD and State agreed to establish a work group to resolve disagreements on exemption use and for DOD to revise and distribute its guidelines accordingly. However, DOD misunderstood the intent of our recommendation on oversight, stating that there is no existing mechanism whereby the U.S. government can collect data from exporters to monitor exports of defense items made under exemptions and that such a mechanism would exceed DOD's existing authority. As a result, we clarified the language in this recommendation to indicate that DOD should ensure that the revised guidelines provide the appropriate oversight mechanisms for the exemption certification process, such as the collection of data from all DOD components on exemptions they certified.

Background

Authority for controlling the export of defense items is provided through the Arms Export Control Act,⁶ and these exports are regulated through the ITAR by State Department's Directorate of Defense Trade Controls. While most defense items require a license for export, the ITAR contains numerous exemptions from licensing requirements that have defined conditions and limitations. For exports that directly support DOD activities, such as exports related to defense cooperative programs, exporters may claim an exemption from licensing requirements pursuant to the written request, directive, or approval of DOD. In doing so, DOD certifies that the export appropriately qualifies for one or more of a limited number of applicable ITAR license exemptions. As with all exemptions, the exporter decides whether to export using an exemption and bears ultimate responsibility for complying with requirements in the ITAR.

⁶ 22 U.S.C. § 2751 et seq.

In May 2000, the Administration announced 17 proposals as part of its Defense Trade Security Initiative—an effort to facilitate cross-border defense cooperation and streamline U.S. export controls. One proposal was that DOD make more effective use of ITAR exemptions to facilitate exports that further U.S. government interests in defense cooperation with allies and friendly nations. To clarify exemption use, DOD’s Defense Technology Security Administration (DTSA)—which is responsible for developing and implementing DOD security policies on international transfers of defense-related goods, services, and technologies—issued guidelines in March 2004 for certifying U.S. exporters’ use of certain ITAR exemptions.⁷ These guidelines were provided to the military services, given that they are primarily responsible for managing and implementing international defense cooperative programs.

Guidelines for DOD’s Certification of Exemption Use Have Raised Some Concerns by State

In support of defense activities, DOD components prepare letters certifying the use of certain exemptions by exporters under State’s export control regulations. The approach used by the military services for certifying the use of ITAR exemptions is set forth in DOD guidelines. Nonservice DOD components also certify the use of exemptions but are not subject to the guidelines, which were not issued departmentwide. Some of these nonservice components had created or were creating their own guidelines, which could lead to confusion regarding certain certification practices. State, as the regulator of defense exports, has raised concerns about the guidelines not clearly explaining the purpose and scope of the exemptions available to DOD, and State and DOD disagree on contractors’ use of one exemption that has been certified by DOD components.

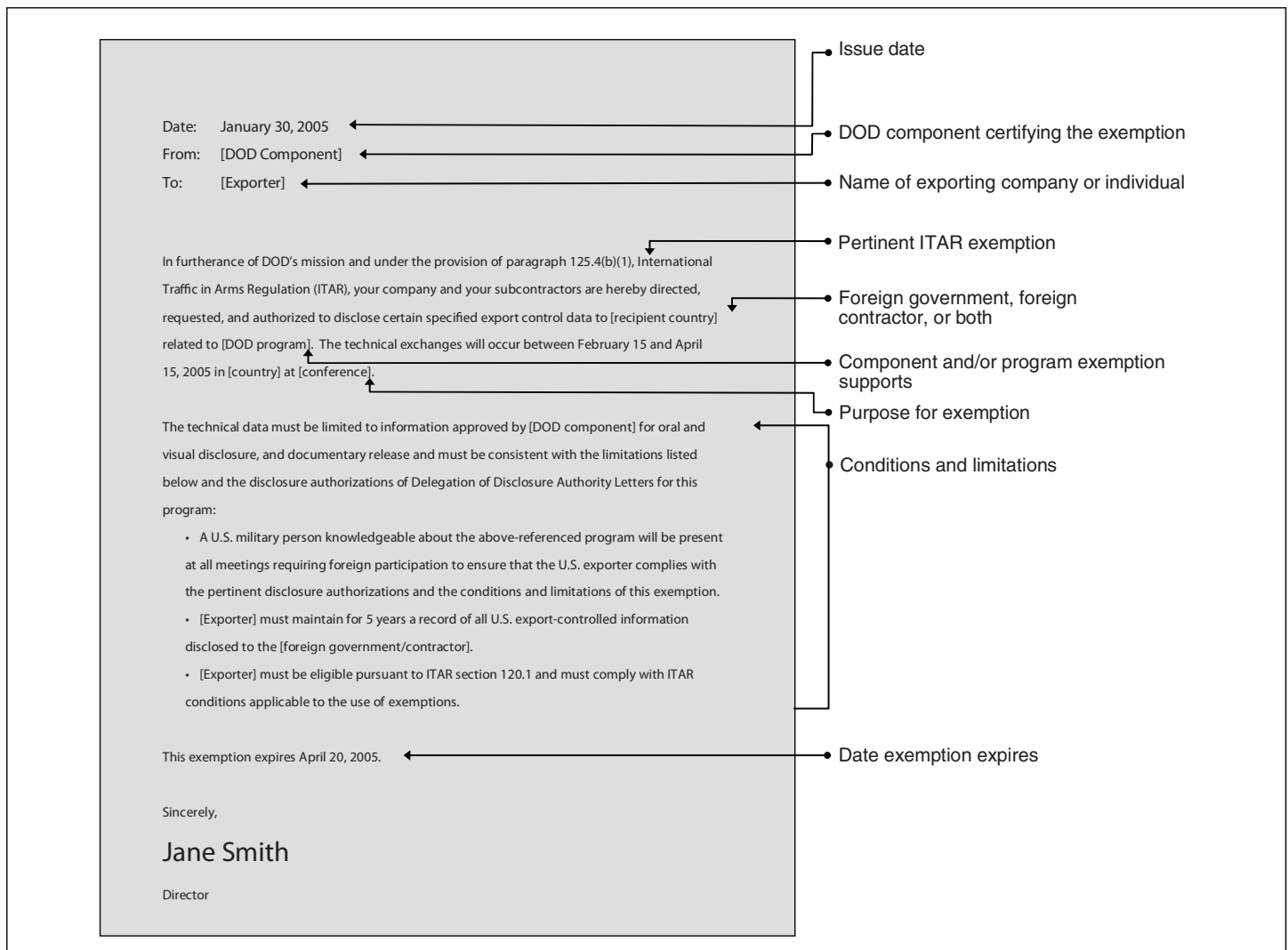
Military Services’ Approach for Certifying ITAR Export Exemptions Is Set Forth in DOD Guidelines, but These Guidelines Were Not Issued DOD-wide

Some ITAR exemptions apply to exports that directly benefit DOD activities, ranging from support of defense cooperative programs, such as the Joint Strike Fighter, to providing equipment and technical services necessary to support U.S. forces in foreign locations. For such exemptions, DOD confirms whether the export activity appropriately qualifies for the use of an exemption and typically documents this confirmation in a written letter directly to the exporter or sometimes to the cognizant DOD program office that the exemption will benefit.

⁷ According to DOD officials, this certification was intended to meet the ITAR requirement for DOD’s “written direction or approval.”

Typically, the letters identify the ITAR sections that pertain to the exemption, the type and purpose of the export, the destination country, and a time frame for the export to occur (see fig. 1).

Figure 1: Sample Letter



Source: GAO review of DOD certification letters.

In March 2004, DOD issued guidelines to the military services that were intended to provide a level of oversight for the exemption certification process, such as establishing elements of authority and record-keeping requirements.⁸ The guidelines included the following procedures for certifying exporters' use of ITAR exemptions in support of DOD's activities:

- Established authorized exemption officials within each service to certify the use of ITAR exemptions. These designated general officers or senior executive service personnel in the military services are responsible for overall management and oversight of the exemption certification process.
- Provided elements for the certification, to include (1) a tracking number for the certification; (2) ITAR exemption citation number; (3) name of the exporter for whom use of the exemption is certified; (4) the reason/purpose for certifying use of the exemption and benefit to the U.S. government; (5) description of the specific defense article, service, or technical data exempted; (6) conditions and limitations as necessary to establish a clearly defined scope for defense articles, services, and technical data authorized for export and any handling, control, or accountability measures deemed necessary; (7) the foreign end users; and (8) the expiration date—not more than 1 year from date of issue.
- Required the military services to enter data on exemptions into a centralized DOD database.
- Stated that DTSA would annually report on the services' exemption certification data to State.
- Restated requirements in the ITAR that exemptions may only be certified for use by eligible U.S. persons registered with the Department of State, Director of Defense Trade Controls; and that U.S. persons must comply with ITAR requirements for use of exemptions, including applicable criteria and limitations. DOD certifications do not supersede other ITAR requirements for use of exemptions.
- Listed five exemptions that relate to exports of defense items—such as technical data pursuant to a written DOD request, shipments of defense items by or for U.S. government agencies, or plant visits (classified or unclassified) (see table 1).

⁸ According to DOD, this approach was part of a set of initiatives to facilitate defense trade.

Table 1: ITAR Exemptions Identified in DTSA Guidelines for Military Service Certification and ITAR Exemption Description

ITAR exemption	Description from ITAR ^a
125.4(b)(1)	<p><i>Technical Data Pursuant to Written Request</i></p> <p>“Technical data, including classified information, to be disclosed pursuant to an official written request or directive from the U.S. Department of Defense.”</p>
125.4(c)	<p><i>Responding to a Quote or Bid Proposal</i></p> <p>“Defense services and related unclassified technical data ... to nationals of NATO countries, Australia, Japan, and Sweden, for the purposes of responding to a written request from the Department of Defense for a quote or bid proposal. Such exports must be pursuant to an official written request or directive from an authorized official of the U.S. Department of Defense.”</p>
125.5 (a),(b),(c)	<p><i>Exemptions for Plant Visits</i></p> <p>(a) “A license is not required for the oral and visual disclosure of unclassified technical data during the course of a classified plant visit by a foreign person, provided (1) the classified visit has itself been authorized pursuant to a license issued by the Directorate of Defense Trade Controls; or (2) the classified visit was approved in connection with an actual or potential government-to-government program or project by a U.S. Government agency....” (b) ... Directorate of Defense Trade Controls approval is not required for disclosure of oral and visual classified information during the course of a plant visit approved by the appropriate U.S. Government agency if certain requirements are met, such as the classified information is directly related to that which was approved by the U.S. Government agency.... (c) “...a license is not required for the disclosure to a foreign person of unclassified technical data during the course of a plant visit (either classified or unclassified) approved by the Office of Defense Trade Controls or a cognizant U.S. Government agency... provided the technical data does not contain information in excess of that approved for disclosure.”</p>
126.4(a)	<p><i>Shipments by or for United States Government Agencies</i></p> <p>“A license is not required for the temporary import, or temporary export, of any defense article, including technical data or the performance of a defense service, by or for any agency of the U.S. Government for official use by such an agency, or for carrying out any foreign assistance, cooperative project or sales program authorized by law and subject to control by the President by other means.”</p>
126.4(c)	<p><i>End-Use by U.S. Government Agency in a Foreign Country</i></p> <p>“A license is not required for the temporary import, or temporary or permanent export, of any classified or unclassified defense articles, including technical data or the performance of a defense service, for end-use by a U.S. Government Agency in a foreign country....”</p>

Source: DOD Guidelines for Certifying Use of International Traffic in Arms Regulation Exemptions, (March 2004) and reissued December 2006; International Traffic in Arms Regulations, 22 C.F.R. Parts 125 and 126 (2006).

^aFor complete citations, see appendix II.

DTSA officials stated that DOD has not determined the need for a departmentwide directive or instruction on certifying the use of ITAR exemptions. Because all nonservice DOD components currently are not subject to existing DOD guidelines, officials at some nonservice components that we spoke with had created or were in the process of creating their own exemption guidelines.⁹ A lack of common guidelines

⁹ Some nonservice components incorporated elements of the DOD exemption guidelines into their approach for certifying ITAR exemptions.

could lead to inconsistent certification practices. In addition, some confusion exists regarding certain certification practices. For example, an official from one of the four nonservice components questioned whether the component could provide certifications for exporters with which it had contracts or whether the cognizant military service that maintained the overall contract would need to provide the certification. This official continues to certify exemptions for such exporters with which it contracts.

State and DOD Disagree on the Use of Certain Exemptions by Contractors and the Comprehensiveness of DOD's Exemption Guidelines

State officials, who regulate and control the export of defense items, have raised concerns about DOD's exemption certification guidelines. Specifically, DTSA provided State with proposed revisions to its guidelines in April 2006, and in response, State provided DTSA with written comments raising concerns with the guidelines. According to senior-level export control officials at both State and DOD, they met to discuss areas of disagreement but were unable to reach resolution. To date, State and DOD have not resolved fundamental areas of concern.

- First, State disagreed with DOD's certification of exporters' use of the exemption under ITAR section 126.4(a). According to State officials, language in this section indicates that the exemption is only designed for use by U.S. government personnel for U.S. government end-use and is not designed to be used by contractors. DTSA disagreed on this point and stated that the section's phrase "by or for any agency of the U.S. government" indicates that the exemption can be used by contractors when their work is directed by DOD for its own benefit. In the most recent draft iteration of the guidelines, DTSA now plans to further define responsibility for certifying this ITAR exemption, removing some certification responsibility from the military services in an attempt to provide greater control over its use. However, DTSA officials stated that DOD plans to continue to certify the use of this exemption.
- Second, State indicated that the guidelines to the military services are not clear on the purpose and scope of the exemptions available to DOD. State suggested that DOD revise its guidelines to include (1) ITAR sections 126.6(a) and 126.6(c) on foreign military sales to provide further context, citing that their inclusion would inform the military services that other ITAR exemptions are provided for the exclusive use of DOD in the conduct of its official business, and (2) ITAR section 125.4(b)(3)—the provision of technical data in furtherance of a contract between the exporter and the U.S. government if the contract provides for the export of data—which State identified as one that may be certified by DOD for use by exporters when conducting DOD's

mission. State also noted that the use of each exemption is pursuant to the conditions and terms specified in the ITAR and that the exporter should be directed to the relevant ITAR sections. DTSA officials stated that its guidelines only include those ITAR sections that specifically provide for exemption use for exports at the direction or approval of DOD. DTSA officials further stated that the foreign military sales process is defined separately in the ITAR and that DOD has its own system and process for reporting to State on foreign military sales. (The complete text of cited ITAR sections under discussion can be found in app. II.)

- Finally, State suggested that DTSA be the certifying entity for all other DOD components outside of the military services and that all certifying organizations be trained in the evaluation of certification requests and the application of DOD guidelines. DTSA officials plan to include in the revised guidelines a provision that nonservice DOD components seek guidance from their respective general counsel, as is the current practice.

DOD is in the process of revising its guidelines, which are set to expire in December 2007. These revisions are partially in response to State's concerns, and DOD is planning to submit them to State for its review. However, to date, State and DOD officials have not reached agreement on these issues, and the lack of common understanding of regulatory exemption use could result in inconsistent application of the regulations.

DOD Components Certified the Use of Exemptions for a Variety of Programs and Foreign Recipients

On the basis of over 1,100 certification letters that DOD components provided to us and our review of them, DOD components certified the use of over 1,900 exemptions¹⁰ for multiple companies and various programs from 2004 through 2006. Most of the exemptions were for exports of technical data or services for Air Force or missile defense programs and for exports to long-standing allies.

We identified a number of DOD components that certified the use of ITAR exemptions by exporters. These components varied widely in the number of certifications they issued—ranging from 24 to more than 1,040. Table 2 summarizes highlights of our analysis of export exemptions certified by various DOD components.

¹⁰ DOD components provided us over 1,100 certification letters, some of which covered multiple exporters. We counted an exemption for each company or organization separately, therefore reaching over 1,900 exemptions.

Table 2: GAO Analysis of DOD Exemption Certifications (2004 through 2006)

Area of analysis	Results
Number of certifications, by DOD component	<ul style="list-style-type: none">• Missile Defense Agency—1,040• Air Force—595• Navy—112• National Security Agency—112• Army—53• National Geospatial-Intelligence Agency—24• Acquisition, Technology, and Logistics—24
Most frequently cited ITAR exemptions	<ul style="list-style-type: none">• 125.4(b)(1)—“Technical data, including classified information, to be disclosed pursuant to an official written request or directive from the U.S. Department of Defense.”• 126.4(a)—“Temporary import or export of a defense article or service by or for any agency of the U.S. government for official use by such an agency, or for carrying out any foreign assistance, cooperative project or sales program....”
Most frequent type of export	<ul style="list-style-type: none">• Knowledge transfer (technical data and defense services)
Most frequently cited foreign destinations	<ul style="list-style-type: none">• United Kingdom• NATO• Australia• Canada• Norway• Japan
Programs/activities most often cited	<ul style="list-style-type: none">• Command, Control, Battle Management, and Communications (C2BMC)• Joint Strike Fighter (JSF)• Upgraded Early Warning Radar (UEWR)• Space Based Infrared System (SBIRS)• Joint Project Optic Windmill (JPOW)
Companies/organizations most often identified for exemption use	<ul style="list-style-type: none">• Northrop Grumman• Lockheed Martin• Raytheon• SPARTA• MITRE• Boeing

Source: GAO analysis of DOD component exemption certification letters from calendar years 2004 through 2006.

Of the components we identified, the Missile Defense Agency and the Air Force provided us about 80 percent of the exemption certification letters that we reviewed. Almost all of the certifications were for the export of technical data or for the temporary export of defense items “by or for any agency of the U.S. government for official use by such an agency.” About half of the certifications were for the use of ITAR section 125.4(b)(1) for the export of technical data, including classified information, typically

related to a particular program, such as Joint Strike Fighter or Upgraded Early Warning Radar, with allies during discussions at scheduled meetings or participation in technical conferences in foreign locations. In addition, almost 30 percent of the certifications were for ITAR section 126.4(a), such as exports of technical data, defense services, or hardware in support of joint military exercises. ITAR section 126.4(a) is the one that State and DOD disagree on its use by contractors. An additional 19 percent of the certifications cited both of these ITAR sections. Less than 3 percent of the ITAR exemptions identified were for transfers of software and hardware—primarily for use by U.S. forces outside of the United States, sometimes in support of operations in Iraq. Twenty-one of the certifications issued by two nonservice components cited ITAR section 125.4(b)(3)—technical data in furtherance of a contract between the exporter and the U.S. government if the contract provides for the export of data.

More than 270 exporters, including prime contractors and subcontractors, were identified in exemption certification letters we reviewed. The most frequently identified exporters were defense contractors, but university laboratories and federally funded research and development centers were also identified. Four major defense contractors represented one-fourth of the exemption certifications, with one receiving over 200 certifications. However, more than 80 percent of the exporters were identified five or fewer times in the certifications we reviewed from DOD components. A total of 266 different programs and activities were identified in the certifications, with the Missile Defense Agency having the largest number.¹¹ Over 90 foreign destinations, including NATO, were identified on DOD certifications. The most frequently cited destination country was the United Kingdom—identified 900 times. Thirteen countries were only identified once as exempted export destinations—some of which were situations in which U.S. entities located in the countries were the recipients, not the foreign government or industry of that country.¹² Some certifications were for exports to multiple countries within one geographic region, such as Latin America.

¹¹ Not all certification letters had a specific program listed. Some certification letters had just a description of a meeting, an activity, or a topic.

¹² U.S. entities included U.S. government personnel, U.S. military services, and U.S. military personnel.

State and DOD Lack Complete Data to Oversee Exemptions Certified by DOD

State and DOD lack comprehensive data to oversee the use of DOD-certified exemptions, limiting their knowledge of defense activities under this process. DOD's annual report to State on the use of exemptions captures data from the military services but not from other DOD components. In addition, the data may not capture the magnitude of transfers certified for exemption use. Specifically, we found that one DOD component used one letter to certify multiple companies' use of an ITAR exemption during a 1-year period. This information was not included in the DOD component's reporting on exemption certification use. In addition, we found that some of the certification letters that we reviewed lacked key information that could be helpful in overseeing exemptions certified by DOD components.

The DOD exemption guidelines state that the military services must record the exemption in a centralized DOD database. However, nonservice components, such as the Missile Defense Agency—which had the largest number of certifications from 2004 through 2006—do not record their exemption certification data in the centralized DOD database, known as USXPORTS.¹³ Instead, the nonservice components retain their own records on certified exemptions. In addition, DOD guidelines provide that DOD submit a report to State on exemptions certified for use on an annual basis. In July 2007, DOD submitted its 2006 report to State based on the data contained in USXPORTS. However, the utility of DOD's report to State on exemption use is limited in several areas. First, since DOD collects data for only the military services, its exemption report to State does not provide total exemption data for all DOD components. Specifically, DOD's report to State contained data on 161 certification letters issued by the military services in 2006; for the same year, we collected an additional 271 letters from nonservice components. Second, for each certification letter, the report contains (1) a certification tracking number, (2) certification date, (3) certifying organization, (4) destination country or countries, (5) description of export, and (6) exporter name. However, it does not contain other information that the DOD guidelines specify for inclusion in the certification letters and maintenance in the military services' records on exemption certifications, such as which ITAR exemption is being certified and the expiration date for each exemption.¹⁴

¹³ USXPORTS is a DOD automated system containing export licenses and other related information.

¹⁴ While the DOD guidelines provide that DTSA will annually forward a consolidated report to State, they do not specifically provide for the content of the report.

Therefore, State does not have a complete report for the exemptions certified for use by all of DOD's components.

While the certification letters we reviewed frequently contained the information as called for in the DOD exemption guidelines, some differences existed that resulted in DOD not having insight into the magnitude of transfers certified for exemption use. For example, for its Joint Strike Fighter program, the Air Force issues an annual certification letter—to more than 50 companies—that certifies their use of one ITAR exemption for the purposes of responding to written requests from DOD for a quote or bid proposal. These letters are broad in scope and do not specify what technical data would be released for the program. When these companies listed on the certification letter cite a specific need for using this exemption throughout the year for an export, they submit their request directly to the program office. However, because the Air Force does not require the program office to report these specific data on these program office approvals for transfers, it is likely that the Air Force lacks comprehensive knowledge on exports transferred under the use of this ITAR exemption. From 2004 through 2006, we found that the Joint Strike Fighter program had authorized the release of more than 600 transfers of technical data under the quote or bid proposal exemption containing specific information—such as the types of technical data and related drawings exported and the frequency of these exports—which the Air Force lacks in its central record keeping on exemptions. Further, DOD's 2006 report to State includes only the certification letter that was broad in scope, but it does not include the magnitude of transfers under this certification.

We found some variations in the type of information contained in the certification letters provided by the military services and non-service components, which can lessen DOD's insight into the specific export activities that DOD is certifying.¹⁵ For example, 163 did not specify whether the foreign export destination entity was a foreign government, foreign industry, or U.S. entity.¹⁶ Over 70 certifications—about 4 percent of the total certifications we reviewed—did not contain an expiration date

¹⁵ Some of the information that varied included elements provided for in the DOD exemption guidelines that were issued to the military services.

¹⁶ The DOD guidelines do not provide a level of specificity concerning the foreign end user category, such as whether it is a foreign country, government, or industry official, or a U.S. entity in a foreign country.

for the exemption;¹⁷ for the remainder, the length of coverage from certification date to expiration date ranged from less than 1 day to more than 4.5 years. The scope of the letters ranged from covering one exporter to covering multiple exporters, and about 30 percent of the certifications that we reviewed included subcontractors. While covering more than one exporter under one certification letter may create some workforce efficiencies, it could limit DOD's insight into exporters receiving exemption certifications. In addition, this practice, while not specifically addressed in the DOD guidelines, has raised concern among some contractors that doing so could blur transparency and create some liability issues. Export control officials from each of the four companies we spoke with said they would prefer that each subcontractor have a separate certification letter from DOD to provide a clearer record of, and decrease their liability for, subcontractors' exports.

Conclusions

While the exemption certification process is one way to facilitate defense cooperation with friendly nations and allies, the U.S. government needs a consistent approach to and knowledge of defense export activities certified through this process. However, State and DOD have disparate understandings of regulatory exemption use and guidance, and efforts to resolve these differences have proven unsuccessful. Further, neither State nor DOD has complete and accurate data to obtain sufficient knowledge of the extent to which all DOD components are certifying the use of exemptions for the export of defense items. Therefore, State and DOD cannot readily identify in total and on a program-by-program basis the defense items that DOD has certified for exemption use in support of DOD's activities.

Recommendations for Executive Action

To ensure a common understanding of the use of ITAR exemptions available for DOD's activities, we recommend that the Secretary of State direct the Deputy Assistant Secretary for the Directorate of Defense Trade Controls and the Secretary of Defense direct the Director of the Defense Technology Security Administration to establish a work group to define and resolve disagreements on exemption use and guidelines and to document decisions reached. If the work group cannot reach agreement

¹⁷ While the ITAR does not specify an expiration date for the use of an exemption, the DOD guidelines specify that the certification letter provide an expiration date, not to exceed 1-year from the date the letter is issued.

before the existing DOD exemption guidelines expire, then it should elevate the matter for resolution within its appropriate chain of command. If needed, the Secretary of State should direct the Deputy Assistant Secretary for the Directorate of Defense Trade Controls to revise the ITAR to incorporate any necessary changes. Once agreement is reached, the Secretary of Defense, with concurrence from the Secretary of State, should direct that the guidelines be revised and made applicable to all DOD components.

We are also recommending that the Secretary of Defense should direct the Director of the Defense Technology Security Administration to ensure that the revised exemption certification guidelines provide the appropriate mechanisms for overseeing the exemption certification process, such as the collection of data from all DOD components on exemptions they certified.

Agency Comments

The Departments of Defense and State provided comments on a draft of this report. DOD also provided technical comments, which we incorporated as appropriate. In commenting on our first recommendation, Defense and State both concurred with the need to establish a work group to define and resolve disagreements on exemption use and guidelines, and to document decisions reached. State indicated that initial discussions with DOD have begun, and DOD stated that it plans to codify the understandings in a clear set of guidelines to be issued to DOD components.

In its comments on our second recommendation, DOD did not agree, stating that there is no existing mechanism whereby the U.S. government can collect data from exporters to monitor exports of defense items made under exemptions. DOD further stated that such a mechanism would exceed DOD's existing statutory and regulatory authority because the ultimate responsibility for obtaining appropriate authorization to export defense items rests with the exporter. Our intent was not for DOD to collect information directly from exporters. Instead, our recommendation is intended for DOD to expand its existing data collection of exemptions certified by the military services to include those from all DOD components. To clarify this intent, we modified the language in the recommendation.

Formal written comments provided by DOD and State are reprinted in appendixes III and IV, respectively.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution of it until 30 days from the date of this letter. We will then provide copies of this report to interested congressional committees, as well as the Secretaries of Defense and State; the Attorney General; the Director, Office of Management and Budget; and the Assistant to the President for National Security Affairs. In addition, this report will be made available at no charge on the GAO Web site at <http://www.gao.gov>.

Please contact me at (202) 512-4841 or calvaresibarra@gao.gov if you or your staff have any questions concerning this report. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Others making key contributions to this report are listed in appendix V.

Sincerely yours,

A handwritten signature in black ink, reading "Ann Calvaresi-Barr". The signature is written in a cursive, flowing style. The first name "Ann" is written with a large, stylized capital "A". The last name "Barr" is written with a large, stylized capital "B".

Ann Calvaresi-Barr
Director
Acquisition and Sourcing Management

Appendix I: Scope and Methodology

To describe the approach used by the Department of Defense (DOD) for certifying the use of export exemptions for exporters, we reviewed export control regulations and discussed with the Department of State and DOD their interpretation of when DOD can certify that a specific export activity qualifies for the use of certain export exemptions. We reviewed DOD's exemption certification guidelines, State's response to the guidelines, DOD components' internal guidance on exemption certifications, and DOD components' practices. We also interviewed officials from State's Directorate of Defense Trade Controls—from the Licensing, Compliance, Management, and Policy offices, and DOD's Defense Technology Security Administration about their views on the International Traffic in Arms Regulations (ITAR) allowances for exemption use by exporters, requirements for DOD to direct the use of certain ITAR exemptions, and practices by DOD components that certify the use of exemptions by exporters in support of DOD activities.

We collected and summarized DOD export exemption certification letters for calendar years 2004 through 2006 to summarize the use of DOD-certified exemptions. We selected 2004 because the Defense Technology Security Administration (DTSA) issued guidelines on the certification process to the military services in that year. Prior to 2004, no formal procedures existed for designating senior-level personnel in the military departments for the authorization of ITAR exemption certifications. Through interviews with knowledgeable State and DOD officials, we created a list of DOD components potentially certifying the use of exemptions. While this coordination helped identify the DOD components certifying the use of exemptions, there may be other components that were not included in this list and additional exemption letters might exist. We then contacted the DOD components on our list to ask if they certified exemptions between 2004 and 2006. While some components on our list stated that they did not certify export exemptions, we collected certification letters from those DOD components that did certify the use of exemptions—the Air Force, Army, Navy, Missile Defense Agency, National Geospatial-Intelligence Agency, National Security Agency, and the Office of Acquisition, Technology, and Logistics. We created a database to summarize information provided in these certification letters, such as the exemptions certified, types of exports, and foreign recipients. In some cases, DOD components provided separate letters for each exporter receiving an exemption certification for an activity, while other components combined all exporters onto one exemption certification letter for an activity. Therefore, to get an equitable count, we separated individual companies from exemption certifications granted for multiple companies on one letter. The total number of exemption certification

letters provided by the DOD components to us was 1,142. After separating out the individual companies from the certification letters, the total number of ITAR exemptions certified by the DOD components for the calendar years 2004 through 2006 totaled 1,960.

To examine the extent to which State and DOD oversee the use of export exemptions certified by DOD, we reviewed DOD's 2006 report on certified exemptions provided to State in July 2007. We also interviewed DTSA officials about the USXPORTS automation system and what it contains. To gain a DOD acquisition program office perspective, we interviewed the Joint Strike Fighter Program Office about its exemption certification processes and practices. We compared the data of the program office with the data from the cognizant military service. We also interviewed officials from four of the companies—Boeing, Lockheed Martin, Northrop Grumman, and Raytheon—who most often received certification letters to gain their perspective on DOD components' processes for and guidance to exporters on DOD-certified exemptions. We examined the certification letters we obtained from DOD components and identified differences among information contained in the letters.

Appendix II: ITAR Sections Discussed in This Report

We discussed in this report a number of ITAR subparts and sections that are cited in DOD certification letters, identified in DOD’s exemption certification guidelines, or are under discussion between State and DOD. These ITAR sections are cited below in their entirety.

Table 3: ITAR Sections Cited in This Report

<p>§125.4 Exemptions of general applicability.</p> <p>§125.4(a) The following exemptions apply to exports of technical data for which approval is not needed from the Directorate of Defense Trade Controls. These exemptions, except for paragraph (b)(13) of this section, do not apply to exports to proscribed destinations under §126.1 of this subchapter or for persons considered generally ineligible under § 120.1(c) of this subchapter. The exemptions are also not applicable for purposes of establishing offshore procurement arrangements or producing defense articles offshore (see § 124.13), except as authorized under §125.4 (c). If §126.8 of this subchapter requirements are applicable, they must be met before an exemption under this section may be used. Transmission of classified information must comply with the requirements of the Department of Defense National Industrial Security Program Operating Manual and the exporter must certify to the transmittal authority that the technical data does not exceed the technical limitation of the authorized export.</p> <p>§125.4(b) The following exports are exempt from the licensing requirements of this subchapter.</p> <p>§125.4(b)(1) Technical data, including classified information, to be disclosed pursuant to an official written request or directive from the U.S. Department of Defense;</p> <p>§125.4(b)(3) Technical data, including classified information, in furtherance of a contract between the exporter and an agency of the U.S. Government, if the contract provides for the export of the data and such data does not disclose the details of design, development, production, or manufacture of any defense article;</p> <p>§125.4(c) Defense services and related unclassified technical data are exempt from the licensing requirements of this subchapter, to nationals of NATO countries, Australia, Japan, and Sweden, for the purposes of responding to a written request from the Department of Defense for a quote or bid proposal. Such exports must be pursuant to an official written request or directive from an authorized official of the U.S. Department of Defense. The defense services and technical data are limited to paragraphs (c)(1), (c)(2), and (c)(3) of this section and must not include paragraphs (c)(4), (c)(5), and (c)(6) of this section which follow:</p> <p>(1) <i>Build-to-Print</i>. “Build-to-Print” means that a foreign consignee can produce a defense article from engineering drawings without any technical assistance from a U.S. exporter. This transaction is based strictly on a “hands-off” approach since the foreign consignee is understood to have the inherent capability to produce the defense article and only lacks the necessary drawings. Supporting documentation such as acceptance criteria, and specifications, may be released on an as-required basis (<i>i.e.</i> “must have”) such that the foreign consignee would not be able to produce an acceptable defense article without this additional supporting documentation. Documentation which is not absolutely necessary to permit manufacture of an acceptable defense article (<i>i.e.</i> “nice to have”) is not considered within the boundaries of a “Build-to-Print” data package;</p> <p>(2) <i>Build/Design-to-Specification</i>. “Build/Design-to-Specification” means that a foreign consignee can design and produce a defense article from requirement specifications without any technical assistance from the U.S. exporter. This transaction is based strictly on a “hands-off” approach since the foreign consignee is understood to have the inherent capability to both design and produce the defense article and only lacks the necessary requirement information;</p> <p>(3) <i>Basic Research</i>. “Basic Research” means a systemic study directed toward greater knowledge or understanding of the fundamental aspects of phenomena and observable facts without specific applications toward processes or products in mind. It does not include “Applied Research” (<i>i.e.</i> a systemic study to gain knowledge or understanding necessary to determine the means by which a recognized and specific need may be met. It is a systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements.);</p> <p>(4) <i>Design Methodology</i>, such as: The underlying engineering methods and design philosophy utilized (<i>i.e.</i>, the “why” or information that explains the rationale for particular design decision, engineering feature, or performance requirement); engineering experience (e.g., lessons learned); and the rationale and associated databases (e.g., design allowables, factors of safety, component life predictions, failure analysis criteria) that establish the operational requirements (e.g., performance, mechanical, electrical, electronic, reliability and maintainability) of a defense article. (Final analytical results and the initial conditions and parameters may be provided.)</p>
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(5) *Engineering Analysis*, such as: Analytical methods and tools used to design or evaluate a defense article's performance against the operational requirements. Analytical methods and tools include the development and/or use of mockups, computer models and simulations, and test facilities. (Final analytical results and the initial conditions and parameters may be provided.)

(6) *Manufacturing Know-how*, such as: information that provides detailed manufacturing processes and techniques needed to translate a detailed design into a qualified, finished defense article. (Information may be provided in a build-to-print package that is necessary in order to produce an acceptable defense article.)

§ 125.5 Exemptions for plant visits.

§ 125.5 (a) A license is not required for the oral and visual disclosure of unclassified technical data during the course of a classified plant visit by a foreign person, provided: (1) The classified visit has itself been authorized pursuant to a license issued by the Directorate of Defense Trade Controls; or (2) the classified visit was approved in connection with an actual or potential government-to-government program or project by a U.S. Government agency having classification jurisdiction over the classified defense article or classified technical data involved under Executive Order 12356 or other applicable Executive Order; and (3) the unclassified information to be released is directly related to the classified defense article or technical data for which approval was obtained and does not disclose the details of the design, development, production or manufacture of any other defense articles. In the case of visits involving classified information, the requirements of the Defense Industrial Security Manual (Department of Defense Manual 5220.22M) must be met.

§ 125.5 (b) The approval of the Directorate of Defense Trade Controls is not required for the disclosure of oral and visual classified information to a foreign person during the course of a plant visit approved by the appropriate U.S. Government agency if: (1) The requirements of the Defense Industrial Security Manual have been met; (2) the classified information is directly related to that which was approved by the U.S. Government agency; (3) it does not exceed that for which approval was obtained; and (4) it does not disclose the details of the design, development, production or manufacture of any defense articles.

§ 125.5 (c) A license is not required for the disclosure to a foreign person of unclassified technical data during the course of a plant visit (either classified or unclassified) approved by the Directorate of Defense Trade Controls or a cognizant U.S. Government agency provided the technical data does not contain information in excess of that approved for disclosure. This exemption does not apply to technical data which could be used for design, development, production or manufacture of a defense article.

§ 126.4 Shipments by or for United States Government agencies.

§ 126.4(a) A license is not required for the temporary import, or temporary export, of any defense article, including technical data or the performance of a defense service, by or for any agency of the U.S. Government for official use by such an agency, or for carrying out any foreign assistance, cooperative project or sales program authorized by law and subject to control by the President by other means. This exemption applies only when all aspects of a transaction (export, carriage, and delivery abroad) are affected by a United States Government agency or when the export is covered by a United States Government Bill of Lading. This exemption, however, does not apply when a U.S. Government agency acts as a transmittal agent on behalf of a private individual or firm, either as a convenience or in satisfaction of security requirements. The approval of the Directorate of Defense Trade Controls must be obtained before defense articles previously exported pursuant to this exemption are permanently transferred (e.g., property disposal of surplus defense articles overseas) unless the transfer is pursuant to a grant, sale, lease, loan or cooperative project under the Arms Export Control Act or a sale, lease or loan under the Foreign Assistance Act of 1961, as amended, or the defense articles have been rendered useless for military purposes beyond the possibility of restoration.

NOTE: *Special definition.* For purposes of this section, defense articles exported abroad for incorporation into a foreign launch vehicle or for use on a foreign launch vehicle or satellite that is to be launched from a foreign country shall be considered a permanent export.

§ 126.4(c) A license is not required for the temporary import, or temporary or permanent export, of any classified or unclassified defense articles, including technical data or the performance of a defense service, for end-use by a U.S. Government Agency in a foreign country under the following circumstances:

- (1) The export or temporary import is pursuant to a contract with, or written direction by, an agency of the U.S. Government; and
 - (2) The end-user in the foreign country is a U.S. Government agency or facility, and the defense articles or technical data will not be transferred to any foreign person; and
 - (3) The urgency of the U.S. Government requirement is such that the appropriate export license or U.S. Government Bill of Lading could not have been obtained in a timely manner.
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§ 126.6 Foreign-owned military aircraft and naval vessels, and the Foreign Military Sales program.

§ 126.6 (a) A license from the Directorate of Defense Trade Controls is not required if:

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- (1) The article or technical data to be exported was sold, leased, or loaned by the Department of Defense to a foreign country or international organization pursuant to the Arms Export Control Act or the Foreign Assistance Act of 1961, as amended, and
 - (2) The article or technical data is delivered to representatives of such a country or organization in the United States; and
 - (3) The article or technical data is to be exported from the United States on a military aircraft or naval vessel of that government or organization or via the Defense Transportation Service (DTS).
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§ 126.6 (c) *Foreign Military Sales Program*. A license from the Directorate of Defense Trade Controls is not required if the defense article or technical data or a defense service to be transferred was sold, leased or loaned by the Department of Defense to a foreign country or international organization under the Foreign Military Sales (FMS) Program of the Arms Export Control Act pursuant to an Letter of Offer and Acceptance (LOA) authorizing such transfer which meets the criteria stated below:

- (1) Transfers of the defense articles, technical data or defense services using this exemption may take place only during the period which the FMS Letter of Offer and Acceptance (LOA) and implementing USG FMS contracts and subcontracts are in effect and serve as authorization for the transfers hereunder in lieu of a license. After the USG FMS contracts and subcontracts have expired and the LOA no longer serves as such authorization, any further provision of defense articles, technical data or defense services shall not be covered by this section and shall instead be subject to other authorization requirements of this subchapter; and
 - (2) The defense article, technical data or defense service to be transferred are specifically identified in an executed LOA, in furtherance of the Foreign Military Sales Program signed by an authorized Department of Defense Representative and an authorized representative of the foreign government, and
 - (3) The transfer of the defense article and related technical data is effected during the duration of the relevant Letter of Offer and Acceptance (LOA), similarly a defense service is to be provided only during the duration of the USG FMS contract or subcontract and not to exceed the specified duration of the LOA, and
 - (4) The transfer is not to a country identified in § 126.1 of this subchapter, and
 - (5) The U.S. person responsible for the transfer maintains records of all transfers in accordance with Part 122 of this subchapter, and
 - (6) For transfers of defense articles and technical data,
 - (i) The transfer is made by the relevant foreign diplomatic mission of the purchasing country or its authorized freight forwarder, provided that the freight forwarder is registered with the Directorate of Defense Trade Controls pursuant to part 122 of this subchapter, and
 - (ii) At the time of shipment, the Port Director of U.S. Customs and Border Protection is provided an original and properly executed DSP-94 accompanied by a copy of the LOA and any other documents required by U.S. Customs and Border Protection in carrying out its responsibilities. The Shippers Export Declaration or, if authorized, the outbound manifest, must be annotated "This shipment is being exported under the authority of Department of State Form DSP-94. It covers FMS Case [insert case identification], expiration [insert date]. 22 CFR 126.6 applicable. The U.S. Government point of contact is _____, telephone number _____," and
 - (iii) If, classified hardware and related technical data are involved the transfer must have the requisite USG security clearance and transportation plan and be shipped in accordance with the Department of Defense National Industrial Security Program Operating Manual, or
 - (7) For transfers of defense services:
 - (i) A contract or subcontract between the U.S. person(s) responsible for providing the defense service and the USG exists that: (A) Specifically defines the scope of the defense service to be transferred, (B) Identifies the FMS case identifier, (C) Identifies the foreign recipients of the defense service, (D) Identifies any other U.S. or foreign parties that may be involved and their roles/responsibilities, to the extent known when the contract is executed, (E) Provides a specified period of duration in which the defense service may be performed, and
 - (ii) The U.S. person(s) identified in the contract maintain a registration with the Directorate of Defense Trade Controls for the entire time that the defense service is being provided. In any instance when the U.S. registered person(s) identified in the contract employs a subcontractor, the subcontractor may only use this exemption when registered with DDTC, and when such subcontract meets the above stated requirements, and
 - (iii) In instances when the defense service involves the transfer of classified technical data, the U.S. person transferring the defense service must have the appropriate USG security clearance and a transportation plan, if appropriate, in compliance with the Department of Defense National Industrial Security Program Operating Manual, and
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Appendix II: ITAR Sections Discussed in This Report

(iv) The U.S. person responsible for the transfer reports the initial transfer, citing this section of the ITAR, the FMS case identifier, contract and subcontract number, the foreign country, and the duration of the service being provided to the Directorate of Defense Trade Controls using DDTC's Direct Shipment Verification Program.

Source: ITAR, 22 C.F.R. Parts 125 and 126 (2006).

Appendix III: Comments from the Department of Defense



DEFENSE TECHNOLOGY SECURITY ADMINISTRATION

2900 DEFENSE PENTAGON
WASHINGTON, DC 20301-2900

SEP - 7 2007

Ann Calvaresi-Barr
Director
Acquisition and Sourcing Management
Government Accountability Office
441 G Street N.W.
Washington, D.C. 20548

Dear Ms. Ann Calvaresi-Barr:

This is the Department of Defense (DoD) response to the GAO draft report 07-1103, "DEFENSE TRADE: Clarification and Increased Oversight of Export Exemptions Certified by DoD Is Needed," dated August 15, 2007, (GAO CODE 120617). I appreciate the professional and constructive manner in which the GAO team conducted this review. In this same spirit, I offer the following comments and information.

RECOMMENDATION 1: The GAO recommends that the Secretary of Defense direct the Director of the Defense Technology Security Administration to establish a work group with the Department of State to define and resolve disagreements on exemption use and guidelines, and to document decisions reached. If the work group cannot reach agreement before the existing DoD exemption guidelines expire, then it should elevate the matter for resolution within its appropriate chain of command. Once agreement is reached the Secretary of Defense should direct that the guidelines be revised and made applicable to all DoD components. (p. 15/GAO Draft Report)

DOD RESPONSE: Concur with recommendation in substance, including the recommendation that DTSA's Guidelines be expanded to all DoD components. See attached line-in/line-out for details. The Director of DTSA has agreed with her counterpart at the Department of State, the Deputy Assistant Secretary, Directorate of Defense Trade Controls, to initiate a working group as described in the draft Report. This working group will define and resolve disagreements on the use of exemptions by the DoD and codify the understandings in a clear set of guidelines to be issued to DoD components.

RECOMMENDATION 2: The GAO recommends the Secretary of Defense direct the Director of the Defense Technology Security Administration to collect data on exports of defense items made under exemptions certified by all DoD components, analyze trends and usage, and include this information in its report to State. (p. 16/GAO Draft Report)

DOD RESPONSE: Non-concur with the recommendation.



There is no existing mechanism whereby the US Government can collect data from exporters in order to monitor exports of defense items made under exemptions, whether or not the use of those exemptions was certified by any or all DoD components, such that DoD could analyze trends and usage and include such information in a DoD report to State. Such a mechanism would exceed DoD's existing statutory and regulatory authority because the ultimate responsibility to obtain the appropriate USG authorization for an export (whether a license or an exemption) always rests with the exporter. The exporter is also responsible for maintaining records of what material is exported and whether under a license or under a license exemption and must be able to support its decision to utilize an exemption in lieu of obtaining an export license.

Creating a mechanism involving DoD that would allow DTSA to "...collect data on exports of defense items made under exemptions certified by all DoD components, analyze trends and usage, and include this information in its report to State" would require changes to the Arms Export Control Act (AECA) to provide DoD with enforcement and compliance function authority and responsibility that it does not currently have. Imposing such a requirement on DoD will require additional personnel resources.

The Guidelines DTSA developed and provided to the Services in 2004 were developed in response to a voluntary request from the Services for DTSA's guidance on the process of certifying use of exemptions by Service contractors that explicitly require a written directive from DoD. The Guidelines developed by DTSA were intended to provide a response to the Services' request; the Guidelines were never intended to obtain such data, nor were they ever expected to lead to collection of comprehensive data on use of exemptions by DoD components or their contractors.

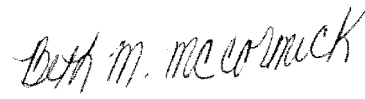
The fact that a DoD component has issued a letter certifying that a particular situation appears to comply with the requirements of the ITAR for use of an exemption does not itself constitute a US Government export authorization, nor does it absolve the exporter of its responsibilities under the AECA and the ITAR. All five of the ITAR exemptions identified in the DoD Guidelines and many others that do not involve the DoD are exemptions the exporter may claim with or without a written certification from DoD on the exporter's own responsibility (i.e., so-called "self-claimed" exemptions).

If such data is to be collected and analyzed, it should be done by the Department of State, which has the statutory and regulatory compliance and enforcement authority. Additionally, the data should also include information from the exporters on the vast array of other export license exemptions that do not require any sort of "certification" from DoD.

Attached please find a series of detailed comments on the text of the draft Report for your consideration.

**Appendix III: Comments from the Department
of Defense**

Thank you for the opportunity to comment. My point of contact for GAO matters is Dr. Peter Leitner, peter.leitner@osd.mil, or 703-325-4080.



Beth M. McCormick
Director (Acting),
Defense Technology
Security Administration

Attachment:
As stated

Appendix IV: Comments from the Department of State



United States Department of State

*Assistant Secretary for Resource Management
and Chief Financial Officer*

Washington, D.C. 20520

Ms. Jacquelyn Williams-Bridgers
Managing Director
International Affairs and Trade
Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548-0001

SEP 12 2007

Dear Ms. Williams-Bridgers:

We appreciate the opportunity to review your draft report, "DEFENSE TRADE: Clarification and Increased Oversight of Export Exemptions Certified by DOD Is Needed," GAO Job Code 120617.

The enclosed Department of State comments are provided for incorporation with this letter as an appendix to the final report.

If you have any questions concerning this response, please contact Capt. Laurell Brault, Deputy Director, Bureau of Political-Military Affairs, at (202) 663-2736.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Kaplan".

Sid Kaplan (Acting)

cc: GAO – Anne-Marie Lasowski
PM – Stephen Mull
State/OIG – Mark Duda

Department of State Comments on GAO Draft Report
DEFENSE TRADE: Clarification and Increased Oversight of Export
Exemptions Certified by DOD Is Needed
(GAO-07-1103, GAO Code 120617)

The GAO report DEFENSE TRADE: Clarification and Increased Oversight of Export Exemptions Certified by DOD Is Needed (GAO-07-1103 GAO Code 120617) contains recommendations for the Department of State.

In the first recommendation, the Department of State's Directorate of Defense Trade Controls (PM/DDTC) is requested to establish a working group with the Director of the Defense Technology Security Administration (DTSA) to define and resolve disagreements on exemption use and guidelines and to document decisions reached. GAO also recommended that DDTC revise the International Traffic in Arms Regulations (ITAR) if needed, based on the findings in the report and the outcome of the working group discussions.

DDTC concurs with the GAO recommendations. Initial discussions are already underway between the Department and DoD officials.

Appendix V: GAO Contact and Staff Acknowledgments

GAO Contact

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Acknowledgments

In addition to the contact name above, Anne-Marie Lasowski, Assistant Director; Lisa Gardner; Sharron Candon; Peter Grana; Arthur James, Jr.; Karen Sloan; and Marie Ahearn made key contributions to this report.

Related GAO Products

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